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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-717

JACK FRISTOE,

Petitioner,

vs.

REYNOLDS METALS COMPANY, a California corporation; PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, DISTRICT COUNCIL NO. 2, Local Union No. 708, an unincorporated association; INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS UNION, AFL-CIO, an unincorporated association,

Respondents.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent Reynolds Metals Company respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the Ninth Circuit filed August 8, 1979, in the above-entitled case.

Questions Presented.

Petitioner is dissatisfied with the results below and therefore complains to this Court. While difficult to discern, it appears that the petition presents the following questions:

1. Whether the Ninth Circuit's decision, which holds that it is not a breach of the duty of fair representation to refuse in good faith to arbitrate an employee's grievance arising from an off-duty but job-related fight with supervision, conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972).
2. Whether the Ninth Circuit's decision conflicts with any applicable decisions of this Court concerning joinder in removal petitions, a union's duty to investigate grievances and the omission of depositions from the record.

Statement of the Case.

On July 14, 1973, Jack Fristoe (Petitioner) received a written warning from his supervisor for failing to perform his job properly as an employee of Reynolds Metals Company (Respondent). At the end of his workshift, Petitioner drove to a bar located in the opposite direction from that normally taken to travel to his home and waited for his supervisor to arrive. When the supervisor, accompanied by two friends, arrived at the bar, Petitioner confronted him concerning his "work at the plant" and a fight ensued during which Petitioner struck his supervisor with his fists. Respondent, following an investigation, discharged Petitioner from its employ and Petitioner grieved pursuant to the exclusive grievance and arbitration procedure in the collective bargaining agreement between Respondent and Printing Specialties and Paper Products Union, District Council No. 2, Local Union 708 (Unions).

Although the Unions pressed Petitioner's grievance through the first three steps of the grievance and arbitration procedure, the Unions, after learning that the only two eyewitnesses to the fight had stated that Petitioner was the aggressor and that the fight was demonstrably work related, decided not to seek arbitration of the grievance.

In August 1974 Petitioner, without first attempting to exhaust the remedies provided under the Unions' constitution, filed suit against Respondent and certain unspecified or fictitious defendants in the California Superior Court, which suit Respondent removed to the United States District Court for the Central District of California. Petitioner eventually added the Unions as defendants and alleged that Respondent had breached the collective bargaining agreement by discharging him and that he need not exhaust his contractual remedy because the Unions had breached their duty to fairly represent him in connection with his grievance. The District Court, finding Petitioner's allegations to be without merit, granted summary judgment for Respondent and the Unions in September 1977.

The Court of Appeals for the Ninth Circuit affirmed, finding that the suit had been properly removed, that Petitioner had not satisfied the requirement to exhaust his contractual remedy as he had not demonstrated a breach of the duty of fair representation, that Petitioner had not exhausted his internal union remedies and that Petitioner had not shown any prejudice by the omission of two depositions from the record. Petitioner now renews his previously rejected arguments in this Court.

REASONS FOR DENYING THE WRIT.

The Ninth Circuit's decision, rendered on an uncomplicated factual record and pursuant to well-established precedents, raises no conflicts with the decisions of other circuits or with the decisions of this Court. The petition is patently specious in that it contends, in effect, that this Court should ignore its earlier decisions and determine, for this case alone, that the Unions breached their duty of fair representation by refusing in good faith to pursue Petitioner's grievance to arbitration.

I

The Duty of Fair Representation Does Not Require That Each Grievance Be Arbitrated.

This Court long ago recognized that contractual grievance and arbitration procedures are usually controlled by the unions and employers who devised them and therefore are potentially subject to abuse. *Vaca v. Sipes,* 386 U.S. 171, 185 (1967). At the same time the Court was quick to conclude that "a union does not breach its duty of fair representation . . . merely because it settled the grievance short of arbitration." *Id.* at 192. The Court stated that a grievance and arbitration procedure can only operate successfully if a union can settle non-meritorious grievances short of the costly and time-consuming step of arbitration. Indeed, "if the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined," and it is doubtful that employers and unions "would continue to provide for detailed grievance and arbitration procedures of the kind encouraged by [Labor-Management Relations Act] §203(d)." *Id.* at 191-92.

In recognition of the important policies in favor of maintaining control of grievance and arbitration procedures with the parties to collective bargaining agreements and in recognition of the need to protect the individual employee from a union's bad faith refusal to pursue his grievance, this Court determined that a union breaches its duty of fair representation whenever its conduct towards a member of the collective bargaining unit "is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. at 190.

That test is exactly what the Ninth Circuit applied to the facts herein when it concluded that there had been no breach of the duty of fair representation because there had been no "showing of arbitrariness or hostility on the part of the union" (Petition for Writ of Certiorari, pp. 30, 32-33). Petitioner ignores the facts that the record overwhelmingly establishes that his grievance was without merit and that the Unions had good reasons to refuse to arbitrate herein and, as a practical matter, argues that he should be given special treatment by this Court despite his failure to establish arbitrary or bad faith union conduct. What Petitioner does, then, is underscore the wisdom of the *Vaca* standard, for Petitioner has consistently been unable realistically to evaluate his grievance.

II

No Conflict Exists Between the Ninth Circuit's Decision Herein and the Decision of the Fourth Circuit.

Petitioner suggests that there is a conflict between the decision in *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972) and the Ninth Circuit's decision here. Specifically, Petitioner states that *Griffin* holds that a union breaches its duty of fair representation when it fails to pursue to arbitration a grievance arising from the discharge of an employee engaged in an off-duty fight with a supervisor (Petition for Writ of Certiorari, pp. 3-4, 15).

Petitioner has, at best, misread *Griffin*. There the employer had discharged an employee for fighting with his supervisor after working hours, but the record does not establish that the fight was job related and the Fourth Circuit does not so find. Rather, that court, in affirming a jury verdict for the employee, found that there was evidence from which the jury could find that the union acted "arbitrarily" by presenting the grievance for resolution to the supervisor who participated in the fight and that the union acted in "bad faith" because its officials failed to pursue the employee's grievance as a result of their personal friendships with the supervisor. That court, then, applied the test of *Vaca v. Sipes*, 386 U.S. at 190, to the facts of that case as the jury could reasonably view those facts.

Griffin does not, then, conflict with the decision herein because both courts have applied the same legal standard to the peculiar facts presented, because there is no holding there that the fight was job related, as is the case here, and because there is a holding there that the jury could determine that the union

acted arbitrarily and in bad faith based on facts that do not exist here. Put differently, the *Griffin* court applied the test developed in *Vaca* to those peculiar facts, as a jury could view them, and reached one conclusion, while the Ninth Circuit applied the same test to these facts and properly reached a different conclusion.

III

The Ninth Circuit Has Not Failed to Follow Any Decisions of This Court.

Although the petition herein is ambiguous, Petitioner apparently contends that the Ninth Circuit did not properly apply several decisions of this Court to the facts. Even if this contention were true, such a failure would not establish a conflict in decisions, entitling Petitioner to a review in this Court. However, that error does not exist for the reasons set forth below.

A. The Removal Was Proper.

Petitioner—while renewing his contention that all "defendants" should have joincd in the removal petition despite the fact that they had not been named in the state court action, were unserved and were nominal or fictitious parties—argues for the first time here that the Ninth Circuit, in rejecting Petitioner's removal argument, did not consider that the District Court had an obligation to remand the action to the state court on its own motion when it became aware of the "joinder" defect (Petition for Writ of Certiorari, pp. 9-10). Aside from the facts that this argument was not made before the Ninth Circuit and could not in any case establish a conflict in decisions, the Ninth Circuit specifically found that no joinder defect existed based on authority which has not been brought

into question by the petition. As there is no joinder defect, the District Court had no obligation to remand on its own motion.

B. There Has Been No Breach of the Duty of Fair Representation and Summary Judgment Was Proper.

Petitioner suggests that the Unions' investigation of his grievance was inadequate under *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) because he was not personally interviewed by the Unions' business agent while such agent did review the written statements of two witnesses to the fight (Petition for Writ of Certiorari, pp. 11-12). No decisional conflict is possible because the decision of this Court in *Hines* determined an issue of employer liability when a union had breached its duty of fair representation. Moreover, in the Sixth Circuit decision there (*Hines v. Local 377, Teamsters Union*, 506 F.2d 1153 (6th Cir. 1974)) the court held that a union's grievance investigation was inadequate because evidence favorable to the employees existed, but the union made no attempt to obtain it and that failure occurred in the context of union hostility towards the employees. Here Petitioner has completely failed to establish that additional investigation by the Unions would have changed the result, that the Unions acted out of hostility towards the Petitioner or that a decision of this Court has been ignored.

Petitioner is again arguing that the Court should, for his particular case, ignore the test it wisely developed in *Vaca* and find a breach of the duty of fair representation simply because the Unions refused to pursue a grievance arising from an off-duty fight to arbitration without any evidence that the Unions acted arbitrarily, discriminatorily or in bad faith. Petitioner's request for such special treatment deserves no further consideration.

C. Petitioner Has Not Been Denied Due Process.

Finally, Petitioner asserts once again that he has been denied due process because two depositions were not before the District Court when it rendered summary judgment for Respondent and the Unions (Petition for Writ of Certiorari, pp. 13-14). Again, as the Ninth Circuit expressly found, Petitioner makes no showing that he has been prejudiced by such omission and his reliance upon *United States v. Throckmorton*, 98 U.S. 61 (1878), which provides guidance in cases where a judgment has been obtained through fraud, is totally misplaced.

Conclusion.

Since Petitioner has established no conflict between the Ninth Circuit's decision herein and the decision of any other court of appeals or this Court, but rather has asked for special treatment inconsistent with existing decisions, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Dated: December 4, 1979.

Respectfully submitted,

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